No. 12606

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

Sidney Gandelman,

Appellant,

vs.

The Mercantile Insurance Company of America and The Reliance Insurance Company of Philadelphia,

Appellees.

APPELLEES' BRIEF.

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Statement of the Case.

This is a suit by appellant against the two appellees to recover upon two separate policies of fire insurance alleged to have been in effect at the time of a fire occurring April 11, 1947.

Appellees' answer put in issue certain of the allegations of the complaint, and after a partial trial resulting in a mistrial, a partial stipulation of facts was entered into. [Tr. Vol. I, pp. 20-26.]

Appellant made a motion for summary judgment against both appellees upon the ground that there was no genuine issue as to any material facts and based his motion upon the pleadings, stipulation of facts and his affidavit filed

therewith. [Tr. p. 28.] Appellees, and each of them, made a motion for summary judgment in their favor on the ground that there was no genuine issue as to any material facts and based their motion upon the affidavit of Edward Oelsner, the pleadings and files and proceedings herein, the stipulation of facts, and the transcript of the proceedings of March 8, 1949 (the partial trial resulting in mistrial), and upon certain exhibits referred to in the aforesaid stipulation of facts.

The court denied appellant's motion and granted appellees' motion. [Opinion, Tr. Vol. I, pp. 82-94; Judgment, Tr. Vol. I, pp. 95-96.]

Statement of Facts.

The motions for summary judgment made by both appellant and appellees were based upon the grounds that there was no genuine issue as to any material fact and each party moved for judgment as a matter of law.

The trial court made a careful analysis of the undisputed facts in its opinion, accepting, where there was any inference or apparent conflict, appellant's version and resolving it against appellees, and to his statement of facts we first refer. [Opinion, Tr. Vol. I, pp. 83-86.] A signed statement of facts was filed in the action, which statement of facts followed the complaint and covered all of the material facts alleged therein, with the exception of three paragraphs which will hereinafter be noted. [Stipulation of Facts, Tr. Vol. I, pp. 20-26.]

It is as follows:

"It Is Hereby Stipulated and Agreed between plaintiff and defendants that the following facts are stipulated to be true for all purposes of the trial herein:

I.

That this Court has jurisdiction of this action by reason of the following facts, the particulars of which are hereinafter more fully alleged: a diversity of citizenship exists between the plaintiff and each of the defendants and the amount in controversy is in excess of Three Thousand ($3,000.00) Dollars, exclusive of interest and costs.

II.

At all times herein mentioned, plaintiff was, and now is a citizen and resident of the State of California.

III.

Defendant, The Mercantile Insurance Company of America, is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of New York, a citizen and resident of said State of New York, and authorized to transact the business of fire insurance in and by the State of California.

IV.

Defendant, The Reliance Insurance Company of Philadelphia, is and was at all times herein mentioned a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania, a citizen and resident of said State of Pennsylvania, and authorized to transact the business of fire insurance in and by the State of California.

V.

At all times herein mentioned, plaintiff was engaged in business at number 145 South Anderson Street, Los Angeles, California, under the fictitious name of New York Furniture Company, and was the owner of certain merchandise consisting principally of furniture, located at said address; prior to the filing of this complaint, plaintiff had filed with the County of Los Angeles, a certificate of doing business under the name of New York Furniture Company.

VI.

At all times herein mentioned, the National Fire Insurance Company of Hartford was a corporation transacting the business of fire insurance in the State of California.

VII.

At all times herein mentioned, Edward Oelsner of Los Angeles, California, was duly licensed by the State of California to act as agent for fire insurance companies, and at all of said times said Edward Oelsner was the duly appointed, authorized, and acting agent for defendants, The Mercantile Insurance Company of America, The Reliance Insurance Company of Philadelphia, and for said National Fire Insurance Company of Hartford.

VIII.

On or about October 1, 1946, said National Fire Insurance Company of Hartford, by and through its said agent, Edward Oelsner, issued to plaintiff its provisional reporting form policy of fire insurance No. 281653, insuring plaintiff for one year against loss to said stock of merchandise for the provisional amount of $100,000.00, being 100% of the total con-

tributing insurance with a limit of liability for all contributing insurance of $175,000.00. That said policy except as to insuring company, provisional amount, percentage of contribution, and limit of liability was identical in form with Exhibits 'A' and 'B' attached to plaintiff's complaint.

IX.

On or about April 2, 1947, said National Fire Insurance Company of Hartford executed and delivered to its said agent, Edward Oelsner, for attachment to said policy, an endorsement wherein it was provided that said policy should be for the provisional amount of $50,000.00, being 50% of the total contributing insurance, with a limit of liability for all contributing insurance of $140,000.00; upon receipt of said endorsement and on or about April 3, 1947, said Edward Oelsner requested said National Fire Insurance Company of Hartford to amend said endorsement to provide that said policy should be for the provisional amount of $50,000.00, being 35% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of $200,000.00 and said National Fire Insurance Company of Hartford did thereupon execute and deliver to said Edward Oelsner an amended endorsement in conformity to and in compliance with said request.

X.

On or about April 2, 1947, said Edward Oelsner, as agent for defendant, The Mercantile Insurance Company of America, did thereupon contact the Los Angeles office of said defendant and did request of said defendant permission to issue to plaintiff a provisional reporting form policy of fire insurance covering said merchandise; that said defendant did then

and there authorize its said agent, Edward Oelsner, to execute and issue its policy of fire insurance No. 290973 in favor of plaintiff and insuring said merchandise for the provisional amount of $5,000.00, being 5% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of $200,000.00; that said Edward Oelsner, as such agent, did thereupon prepare said policy; that a photostat copy of said policy is attached to plaintiff's complaint and marked Exhibit 'A,' and is hereby referred to the same as though herein set forth in full.

XI.

On or about April 2, 1947, said Edward Oelsner, as agent for the Defendant, The Reliance Insurance Company of Philadelphia, did thereupon contact the Los Angeles Office of said defendant, and did request said defendant to issue to plaintiff a provisional reporting form policy of fire insurance covering said merchandise; that said defendant did then and there authorize its said agent, Edward Oelsner, to execute and issue its policy of fire insurance No. PF 804647 in favor of plaintiff and insuring said merchandise for the provisional amount of $12,500.00, being 7½% of the total contributing insurance, with a limit of liability for all contributing insurance in the sum of $200,000.00; that said Edward Oelsner, as such agent, did thereupon prepare said policy; that a photostat copy of said policy is attached to plaintiff's complaint and marked Exhibit 'B' and is hereby referred to the same as though herein set forth in full.

XII.

On April 11, 1947, from a cause unknown, a fire occurred on the premises referred to in paragraph V

and completely burned and destroyed plaintiff's said stock of merchandise; said stock of merchandise immediately before its destruction by said fire, was of a reasonable value of not less than $143,978.96.

XIII.

That shortly after said fire, defendants designated Fire Companies Adjustment Bureau, Inc. to investigate and report to them the amount of loss and damage occasioned by said fire and the National Fire Insurance Company designated said Fire Companies Adjustment Bureau, Inc. to act as adjuster for it in connection with the adjustment of plaintiff's said fire loss.

XIV.

As to the allegations of Paragraph XVII of plaintiff's complaint, it is stipulated that plaintiff or anyone acting for or in his behalf had no notice or knowledge of any of the facts or circumstances stipulated to in Paragraphs IX, X and XI hereof until on or about the 17th day of May, 1947, after the fire, when on said date the said Edward Oelsner delivered to plaintiff the exhibits 'A' and 'B' herein referred to and informed plaintiff of the facts set forth in Paragraphs IX, X and XI of this Stipulation.

XV.

On June 9, 1947, plaintiff and defendants, and National Fire Insurance Company of Hartford, acting by said Fire Companies Adjustment Bureau, Inc. entered into a written agreement fixing the sound value of plaintiff's said merchandise at the time of said fire in the sum of $143,978.96, and the amount of loss and damage to said merchandise by reason of said fire in the sum of $143,978.96. Said agreement

is hereto attached marked Exhibit 'C' and made a part hereof.

XVI.

Defendants and each of them waived the requirement in said policies that proofs of loss be filed within sixty days from the date of the fire; that on July 20, 1947, plaintiff filed with each defendant, sworn proof of loss wherein and whereby he claimed the sum of $7,198.95 from defendant, The Mercantile Insurance Company of America, and the sum of $10,798.43 from defendant, The Reliance Insurance Company of Philadelphia, being the pro rata amounts (to wit: 5% and 7½%, respectively, of said loss of $143,-978.96).

XVII.

It is stipulated that if judgment is entered in favor of plaintiff that it may be against defendant, The Reliance Insurance Company of Philadelphia in the amount of $10,798.43 and against defendant Mercantile Insurance Company of America, in the amount of $7,198.95."

In addition to the foregoing stipulation of facts, the appellant, for support of his motion, relied upon his own affidavit and the pleadings herein [Tr. Vol. I, p. 28], and appellees, in support of their motion, relied upon the foregoing stipulation of facts, the testimony adduced by plaintiff in the trial, and the affidavit of Edward Oelsner above referred to [Tr. Vol. I, p. 48].

The stipulation of facts covered all of the material facts except the facts relating to the conversations between the appellant and appellees' agent, Edward Oelsner, prior to the loss, and the facts relating to the payment of the

premium. However, although there is some variance in the testimony of appellant and appellees' witness on these points, appellees contended and contend that there was no material difference in law between the evidence and invited the trial court, for the purpose of the motion, to accept appellant's version, which the trial court did. [Opinion, Tr. Vol. I, p. 83, lines 5-8; p. 85, lines 23-26; p. 86, lines 6-9.]

In paragraph X of appellant's complaint, appellant alleged that in March, 1947, he requested said Edward Oelsner to increase the limit of liability of the fire insurance on said merchandise to the sum of $200,000.00, in such company or companies as should be selected by the said Edward Oelsner. [Tr. Vol. I, p. 5, lines 5-9.] In his affidavit in support of his motion, he says:

> "In the latter part of March, 1947, affiant requested of said Oelsner that he increase the amount or limit of liability of affiant's fire insurance company from $175,000.00 to $200,000.00 and the said Oelsner thereupon stated to affiant, 'you are covered.'" [Tr. Vol. I, pp. 10 to 13.]

In his direct testimony at the trial, appellant testified as follows:

> "I told him I would want more insurance and he said, 'how much do you think you need?,' and I said 'another $25,000 at the present time would cover it.' That was the conversation that I had." [Tr. Vol. II, p. 73, lines 22-25.]

Again on cross-examination at the trial he said:

"Q. Now, just what were the exact words you used to Mr. Oelsner in March when you told him you had been getting in some new stuff? A. What he told me?

Q. No, what you told him—what were the exact words you used? A. Well, I told him, I says, 'Mr. Oelsner,' I says, 'I am getting in some more goods. There is another carload or two carloads of bedroom sui*ts* and dining room suites coming in.' I even told him the company, the name of the company, and I said, 'I need some more insurance.' He said, 'How much more do you think you need?' and I said, 'I think $25,000 will cover it.' He said, 'Okay, Sidney, you are covered.'

Q. And did he say how you were covered? A. Didn't say nothing.

Q. Where were you covered? A. He did not explain me anything.

Q. Or what you were covered in—what company you were covered in? A. All he said to me was, 'Sidney, you are covered.' The same thing always took place whenever I called him.

. . . .

Q. By Mr. Davis: Did he say from when you were covered? A. Did he say from when?

Q. Yes. A. I don't understand the question.

Q. From what date you were covered? A. He did not. He told me, 'You are covered.'

Q. Is that all he said? A. That is right. He said, 'You are covered—I will take care of you.'" [Tr. Vol. II, p. 94, lines 22-25; p. 95, lines 1-19; p. 96, lines 3-12.]

The foregoing is all of the evidence of appellant on this point.

Appellees have an entirely different version, and although the court, for the purpose of the motion, adopted appellant's version, we believe the court should also, in considering one of the motions, have a brief résumé of appellees' version on this point.

As shown by the affidavit of Edward Oelsner, appellees' agent, which statements were not denied, and the stipulation of facts, appellant had in full force and effect at all times a policy with the National Fire Insurance Company which had been executed and delivered about October 1, 1946. This policy was in the same form as the policies of the two appellees, that is, a provisional reporting form, and provided that it insured up to a limit of $175,000.00, being 100% of all contributing insurance. This policy, as well as the policies of appellants, provided for a premium to be paid upon the basis of values reported, and provided that the insurance would cover in accordance with the reports of values filed and at the time of the loss should not cover for more than the amounts included in the last report of values filed prior to the loss. Mr. Oelsner deposes that appellant had not filed monthly reports in accordance with the terms of this policy, the last written report of value had been filed on December 12, 1946, for the period ending November 30, 1946, and showing a value of $101,766.95. That he, on several occasions, had called appellant to remind him of the delinquency and to request that he provide the necessary reports of value as provided for in the National policy. [Tr. Vol. I, p. 51, lines 5-14.] That in the latter part of March, 1947, he had a telephone conversation with Mr. Gandelman concerning the insurance coverage. At that time appellant

stated that he had $165,000.00 in stock at his location, and Oelsner advised him that the National policy had a maximum of $175,000.00, and that he was covered up to $175,000.00, provided he furnished his report for the National Fire Insurance Company to that amount. [Tr. Vol. I, p. 52, lines 8-15.] That he had no other or further conversation with Mr. Gandelman regarding his insurance until after the fire. [Tr. Vol. I, p. 52, lines 14-17.] And that at no time did Gandelman ever ask for or suggest any insurance other than the insurance in the National Fire Insurance Company under the policy referred to, and at no time did he, Oelsner, acting for the appellees or any other of the companies which he represented as agent, suggest to Gandelman that he should have any other or different insurance, as he felt that Gandelman was amply protected against loss by fire by the National Fire Insurance policy referred to, provided he made the reports required, and so advised him. [Tr. Vol. I, p. 52, line 1, to p. 53, line 5.]

As to the payment of the premium, appellant deposed that he paid the premium, and that Oelsner tendered the premium back but the tender was refused by him. [Tr. Vol. I, p. 34, line 19, to p. 35, line 17.]

Oelsner deposes that in the course of business that he, when he delivered the policies to Gandelman with an invoice; that he and Gandelman had a running account and that Gandelman had never balanced the account and that at all times from May 17, 1947, until after the commencement of the action, the balance due from Gandelman to him was in excess of the total of the premiums for the two policies in question. [Tr. Vol. I, p. 58, lines 13-19.] That prior to the commencement of this action, at the direction of the defendant companies, he, Oelsner, ten-

dered to appellant the full amount of the deposit premiums and that appellant refused the tender and that Oelsner thereupon credited the appellant's account for the full amount of the premiums and notified the appellant thereof. [Tr. Vol. I, p. 59, lines 3-10.]

To summarize the entire evidence, adopting appellant's version wherever there is any inference or testimony at variance with appellees, we have the following situation: At all times herein material, appellant was insured by the National Fire Insurance Company under a policy which provided for $175,000.00 limit of liability with the National Fire Insurance Company specifying that it was carrying 100% of all contributing insurance. This policy required only that appellant report to the National Fire Insurance Company the amount of values at risk and the insurance desired up to $175,000.00. In the latter part of March, 1947, appellant called Oelsner, agent for the National Fire Insurance Company as well as agent for the appellees, and stated to him that there was another carload or two of bedroom suites coming in and he needed some more insurance, and Oelsner asked him, "how much more do you think you need?" and he told Oelsner, "I think $25,000 will cover it," and Oelsner said, "Okay, Sidney, you are covered." No further communication was had between the appellant and Oelsner regarding the matter until after the fire.

In the early part of April, 1947, the National Fire Insurance Company advised Oelsner that they had too much at risk and requested Oelsner to reduce their limit of liability from 100% of $175,000.00 to 35% of $200,000.00. Oelsner advised the National Fire Insurance Company that they would attempt to procure other insurance to take up the difference, but that he would expect them to keep

their insurance in full force and effect until he could get commitments from other companies.

On about April 3, 1947, he was advised by appellee, Mercantile, that they would authorize a limit of 5% of $200,000.00 and by the Reliance Insurance Company that they would authorize a 7½% of a $200,000.00 limit. Oelsner, prior to the fire, was unable to get further commitments from other companies and, being unable to get in touch with appellant to advise him of the desires of the National to reduce their coverage, advised the National that no steps were to be taken toward cancelling or reducing their policy until he had conferred with Gandelman.

The fire occurred on April 11, 1947, and at that time the National policy was in full force and effect according to its terms.

After the fire, Oelsner, taking the position that the National policy was covering in full according to its terms, did nothing about the policies which he had prepared in appellee companies until about May 17, 1947, when, fearing a controversy with the National, he delivered the policies to Gandelman and related the full circumstances of what had taken place.

He at all times was acting as agent for the National and appellees, and was not agent for the appellant in any respect. Appellant knew nothing of the transaction between Oelsner and his principal, the appellees and the National Fire Insurance Company, until May 17, 1947, when Oelsner delivered the policies together with an invoice and statement of the transaction as here related. Gandelman made claim against the National and recovered the full amount of his coverage as limited by his declarations.

Argument.

The appellant makes two assignments of error:

1. That the court erred in granting defendants' motion for the reason that there were material issues of facts to be tried.

2. That the court erred in denying plaintiff's motion as there were no material issues of fact to be determined.

Taking appellant's second assignment first, and to dispose of it, we can state that we have no quarrel with the authorities cited by appellant under the heading of "The Rule Applicable on Motion for Summary Judgment" and believe the case cited on page 18 of appellant's brief, *Associated Press v. U. S.,* 326 U. S. 1, where the court says that Rule 56 authorizes summary judgment only where the moving party is entitled to judgment as a matter of law, and no genuine issue remains for trial. And in this respect we believe that it can be demonstrated with very few words that the court did not err in denying plaintiff's motion. According to appellees' evidence in the form of the Oelsner affidavit appellant at no time requested any other insurance than the National Fire Insurance and that the conversations between Oelsner and appellant related to the National, and no other insurance. That Oelsner prepared appellees' policies not for the purpose of effecting insurance, but as part of his efforts to procure an additional $130,000.00 of insurance if and when the National policy was reduced to $70,000.00 and that he saw to it that the National policy remained in full force and effect and that he had no intention of putting appellees' policies into effect until the other commitments

had been obtained, when he would have notified Gandelman of the desire of the National. And further that he did not deliver appellees' policies to appellant over a month after the fire for the purpose of putting the insurance into effect, but for the purpose of aiding the appellant in his negotiations with the National.

The foregoing statment in itself is sufficient to demonstrate that the court could not have granted appellant's motion unless appellant had been willing to accept the version of facts as set out by appellees, and demonstrates from that standpoint a material issue of facts on all of the issues above mentioned.

The Court Did Not Err in Ordering and Entering a Summary Judgment in Favor of Appellees.

Rule 56 of Rules of Civil Procedure contemplates and provides that when a moving party is entitled to a judgment as a matter of law, judgment shall be entered accordingly. In this case, on appellees' motion there are no facts to warrant any other judgment than that ordered by the court, to wit, one in favor of appellees.

Such variance as exists between the testimony of appellant and the testimony of appellees' witness does not affect the proposition that on appellant's testimony and record alone, and disregarding appellees' testimony, appellees were entitled to the judgment the court gave as a matter of law.

It is obvious, as will be hereinafter demonstrated by the cases, that if there was not in existence between appellant and appellees at the time of the fire a contract or contracts of insurance, that appellant was not entitled to recover and judgment as a matter of law was properly

ordered for appellees. This is clearly demonstrated when we consider the whole case under the following headings:

1. WAS THERE IN EXISTENCE AT THE TIME OF THE FIRE OF APRIL 11, 1947, WHICH DESTROYED THE PROPERTY INVOLVED, A VALID ENFORCIBLE CONTRACT OR CONTRACTS OF FIRE INSURANCE BETWEEN PLAINTIFF AND DEFENDANTS.

2. DID THE DELIVERY BY DEFENDANTS' AGENT OELSNER TO PLAINTIFF OF THE TWO POLICIES OF INSURANCE AFTER THE FIRE CREATE A CONTRACT RETROACTIVE TO THE DATE OF THE FIRE.

3. DID THE COLLECTION OF THE PREMIUM BY OELSNER LONG AFTER THE FIRE, AS ALLEGED BY PLAINTIFF, AND THE FAILURE TO RETURN THE SAME UNTIL A FEW MONTHS BEFORE THE COMMENCEMENT OF THE SUIT, CREATE A CONTRACT BY ESTOPPEL.

Examining the first of the above propositions in light of plaintiff's testimony we find that plaintiff's claim relating thereto rests upon a single conversation. He testified in regard thereto as follows:

> "Q. No, what you told him—what were the exact words you used? A. Well, I told him, I says, 'Mr. Oelsner,' I says, 'I am getting in some more goods. There is another carload or two carloads of bedroom sui*ts* and dining room suites coming in.' I even told him the company, the name of the company, and I said, 'I need some more insurance.' He said, 'How much more do you think you need?' and I said, 'I think $25,000 will cover it.' He said, 'Okay, Sidney, you are covered.'
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> Q. And did he say how you were covered? A. Didn't say nothing.

Q. Where were you covered? A. He did not explain me anything.

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"Q. By Mr. Davis: Did he say from when you were covered? A. Did he say from when?

Q. Yes. A. I don't understand the question.

Q. From what date you were covered? A. He did not. He told me, 'You are covered.'

Q. Is that all he said? A. That is right. He said, 'You are covered—I will take care of you.'" [Tr. Vol. II, p. 95, lines 1-19; p. 96, lines 3-12; p. 73, line 22, to p. 74, line 8.]

It is undisputed that the National Fire policy was in full force and effect in the latter part of March, 1947, with a limit of liability of $175,000.00. It is also undisputed that appellant had failed to file reports of value as provided for in said policy, his last written report of values having been filed for the period ending November 30, 1946, disclosing a value of $101,766.95. Appellant deposes [Tr. Vol. I, p. 30, lines 4-7] that after the execution of the National policy, he, from time to time, orally advised Oelsner's office of the approximate value of his stock on hand. This is confirmed by Oelsner in his affidavit in which he says [Tr. Vol. I, p. 51, lines 21-26; p. 52, lines 7-14], appellant notified him by telephone that his values had increased to $162,000.00 and in the latter part of March, 1947, appellant advised him that he had values of $165,000.00 and Oelsner advised him that his policy had

a maximum of $175,000.00 and he was covered up to that amount, provided he furnished his reports to the National Fire Insurance Company to that amount. [Tr. Vol. I, p. 52, lines 10-14.] It is obvious that any conversation that appellant had with Oelsner in reference to his values and coverage was with relation to the National Fire policy and this appellant himself confirms in his affidavit in support of his motion. Speaking of meetings with the adjusters that occurred after the fire, he states:

> "That at said meetings the question of affiant's failure to file written reports of value with National was discussed, and affiant and Oelsner asserted that the policy provisions relating to written reports of value was waived by National because Oelsner had verbally informed National of such values shortly before the fire." [Tr. Vol. I, p. 32, line 22, to p. 33, line 2.]

Disregarding, however, the clear inference from these admitted facts and appellant's own admissions that the conversation with Oelsner in the latter part of March related to reports under the National policy only, and taking the statements of appellant in his affidavit and the transcript at its face value, it is clear, nevertheless, that no contract of insurance for any amount was entered into between appellant and these appellees in the latter part of March, or at any other time.

It is not claimed that there was other than the one conversation in the latter part of March, 1947, and, considering this, what do we have? When asked to give the exact words used, he stated: " 'Well,' I told him, I says, 'Mr. Oelsner,' I says, 'I am getting in some more goods. There is another carload or carloads of bedroom suites and dining

room suites coming in.' I even told him the name of the company and I said, 'I need some more insurance.' He said, 'How much do you think you need?' and I said, 'I think $25,000.00 will cover it.' He said, 'Okay, Sidney, you are covered.'"

This is all that it is claimed was ever said prior to the fire, or for some time thereafter.

Does this make a contract between appellant and appellees by which the parties were mutually bound, appellant to pay a premium to appellees and appellees to make good a loss by fire?

Preliminarily it can be said without reserve that insurance is a contract between parties and governed by the same rules which are applicable to contracts generally.

> *Insurance Code*, Sec. 22;
>
> *Mauck v. Northwestern Nat'l Ins. Co.*, 102 Cal. App. 510, 283 Pac. 338;
>
> *Wells Fargo & Co. v. Pacific Insurance Co.*, 44 Cal. 397;
>
> *Boyer v. U. S. Fidelity & Guaranty Co.*, 206 Cal. 273, 274 Pac. 57;
>
> *Bassi v. Springfield Fire Ins. Co.*, 57 Cal. App. 707, 208 Pac. 154;
>
> *Boole v. Union Marine Ins. Co.*, 52 Cal. App. 207, 198 Pac. 416.

> "A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties."
>
> *Stevenson v. Sun Insurance Office*, 17 Cal. App. 280, 119 Pac. 529.

"Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds."

Boyer v. U. S. Fidelity & Guaranty Co., supra.

Tested by the ordinary rules of contract, there must be an offer and an acceptance communicated between the parties and the minds of the parties must have met and agreed upon all the essential elements of the contract whereby they became mutually bound. The essential elements of an insurance contract are:

(1) The parties between whom the contract is made.

(2) The property or life insured.

(3) The interest of the insured in property insured, if he is not the absolute owner thereof.

(4) The risks insured against.

(5) The period during which the insurance is to continue.

(6) Either:

(a) A statement of the premium, or

(b) If the insurance is of a character where the exact premium is only determinable upon the termination of the contract, a statement of the basis and rates upon which the final premium is to be determined and paid.

Insurance Code, Sec. 380;

K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co., 82 Cal. App. 2d 120, 185 P. 2d 832.

In *American Can Co. v. Agricultural Ins. Co.,* 12 Cal. App. 133, 106 Pac. 720, the court said:

> "A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing. In fact, it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterward merged into the written contract. Hence it is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject matter. (*Kerr on Insurance,* 52, sec. 33; 13 *Am. & Eng. Ency. of Law,* p. 221; *Cleveland Oil & Paint Mfg. Co. vs. Norwich Union Fire Ins. Co.,* 34 Or. 228, (55 Pac. 435).)"

In *K. C. Working Chemical Co. v. Eureka-Security Fire & Marine Ins. Co., supra,* the court, by Vallée Judge, has epitomized the rules relating to oral contracts as follows:

> "To constitute a verbal contract of insurance the minds of the parties must have met upon all of the essential elements of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its dura-

tion in point of time and extent in point of hazard assumed; the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other. (Citing cases.)"

"Oral contracts of insurance must be definite and certain. The parties must agree on all of the essential terms. (Citing cases.)"

"To constitute a valid contract of insurance the minds of the parties must have met on the identity of the person with whom they are dealing. (Citing cases.)"

"A contract of insurance is not effected by a transaction which does not supply the element of mutuality of agreement and mutuality of obligation. (Citing cases.)"

"Until an application for insurance is accepted, no contractual relation exists between an applicant for insurance and an insurance company. (Citing cases.)"

"An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily. (Citing cases.)"

"A mere intention or mental determination on the part of the insurer to accept the application is not of itself sufficient to effect a binding contract. (Citing cases.)"

"A contract of insurance must be assented to by both parties either in person or by their agents. (Citing cases.)"

> "There can be no enforceable contract of insurance if the insured and an agent who represents several companies fail to designate one of the companies before a loss occurs. (Citing cases.)"

> "It is held in a number of cases that payment of the premium is a condition which must be fulfilled if temporary insurance is to be considered as affording protection to the applicant. (Citing cases.)"

> "Mere delay in acting on an application does not create a contract of insurance. (Citing cases.)"

In *American Can Co. v. Agricultural Ins. Co.,* 12 Cal. App. 133, 106 Pac. 720, followed and cited with approval by the court in the case of the *K. C. Working Chemical Co., supra,* plaintiff's broker prepared slips for the renewal of a policy which was to expire the following day and took the slips to the office of Edward Brown & Sons, the agents for the Agricultural Insurance Company, and said to Mr. Brown, "Here, Fred, are some renewals for you" and Mr. Brown said, "All right," and put these slips in a drawer of his desk. The court held that the evidence was insufficient to prove an oral contract and reversed a judgment for the plaintiff. The court in that case, in addition to the language heretofore quoted from it, has the following to say:

> "A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract. How can it be said

> that the defendant agreed to issue a policy to plaintiff when the name of plaintiff was not even mentioned nor in any way communicated to defendant in the oral conversation?"

In *Law v. Northern Assurance Co.,* 165 Cal. 394, 132 Pac. 590, cited with approval in the *K. C. Working Chemical Co.* case, the facts were that the broker for the plaintiff assured met the agent of the insurance company and stated to him, "Henry, I have just got a line on the Fairmont that I can give you." After some conversation in which it was disclosed that the building would be completed in October or November, defendant's agent agreed to take $25,000.00 of the insurance. He asked the plaintiff's broker if he, the agent, would get the renewal, and the reply was "Sure, Henry." The Supreme Court held that this conversation did not create an oral contract of insurance.

In *Toth v. Metropolitan Life Insurance Co.,* 123 Cal. App. 185, 11 P. 2d 94, the court said:

> "Hence our courts of last resort have adopted the rule that proof of such oral contracts must be clear and convincing to the effect that such contract was actually entered into, that each party understood it in the same light and in regard to the same subject matter and that the parties intended to contract in a manner not in the usual course of business. (14 Cal. Jur., p. 429.)"

In the same case, on page 191 of 123 Cal. App., the court said:

> "There is some evidence to the effect that Thomas told decedent that, after the medical examination, he would be 'protected,' but there is no evidence to indi-

> cate what was intended or understood by the word 'protected.' Applying the test prescribed by the California authorities in considering oral contracts of insurance and outlined above, the proof in the case at bar is neither clear nor convincing to the effect that such contract was actually entered into; or that each party understood it in the same light, or in regard to the same subject matter; or that the parties intended to contract in a manner not in the usual course of business."

While many other cases could be cited to the propositions enunciated above, it is unquestioned that the rules so laid down are the general rules, and since the matter is so thoroughly covered in the *K. C. Working Chemical Co.* case, which is the last expression of the California courts, we will not burden this brief by citation of further authorities not precisely in point or of cases from other jurisdictions other than to illustrate the points involved.

Disregarding our own version that all conversations had between Oelsner and the appellant prior to the loss related to the National Fire Insurance Company insurance only, and taking Plaintiff's statements and contentions at their face value, it is clear that any transactions had between Oelsner and Plaintiff prior to the loss did not even approach the dignity of a contract or contracts between appellant and appellees by which each party was mutually bound.

The most glaring deficiency in the transaction of communicated elements necessary to complete a contract is the fact that no party insurer was even mentioned. It is stipulated and conceded that Oelsner, in addition to

the two appellee companies, represented numerous other insurance companies. In the transaction as claimed by appellant, no company was designated as the insurer, even conceding that the alleged statement of Oelsner that "you are covered" constituted an agreement between appellant and Oelsner. There is no contention nor evidence that the appellant even knew that such companies as the appellees were in existence until long after the fire. The situation is identical with the situation in the case of *Ogle Lake Shingle Co. v. National Lumber Ins. Co.*, 122 Pac. 990 (Wash.). There the court said:

> "(1) It is now well established that contracts of insurance may rest in parol. It is as well established that an oral contract for insurance is not enforceable, unless all the elements essential to a contract of insurance have in some manner been agreed upon. 'In other words, nothing can be left open for future negotiations with reference to the subject-matter, parties, rate of premium, amount or duration of risk.' 1 Cooley's Insurance Briefs, 368; Wood on Fire Ins. Sec. 5.
>
> "(2) It will be admitted that the contract of insurance must have been complete at the time of the destruction of the mill on June 4th, or there can be no recovery. If it lacked any of the required essentials, it was not complete. Among these essentials is certainty of parties, and the risk insured against, in neither one of which particulars was there any designation or certainty at the time of the fire. Had Carstens & Earles been an insurance company, or representing only the two companies, in which the policies were subsequently written, it might be held that there was a certainty as to the parties to the contract. It is admitted that it represented sev-

eral other companies at the time of the fire. There is nothing in the correspondence nor in the testimony to indicate in what companies this insurance was to be placed. At the time the representatives of the shingle company called on Cutter to effect the insurance, he had no knowledge of the companies, other than as the names appeared on the letter heads of Carstens & Earles and in the circulars sent to him. They evidently made some inquiry as to the companies to carry the risk, as Cutter says in his testimony, 'I told them it would be placed in two good companies,' but that he could not tell them in what companies. 'I did not know exactly, so I left it all to their (Carstens & Earles) discretion in which companies to place it.' Under these circumstances, no contract existed as to any one of the companies represented by Carstens & Earles. And the first essential of a contract is lacking, in that there was no meeting of minds as to the parties to the contract. So far as we have been able to determine, all the authorities agree that, where an insurance agent represents several companies and there is no designation of the company to take the risk, there is no contract because of the failure of parties. *Hartford Fire Ins. Co. v. Trimble,* 117 Ky. 583, 78 S. W. 462; *Sheldon v. Hekla Inc. Co.,* 65 Wis. 436, 27 N. W. 315; *New Orleans Ins. Ass'n. v. Boniel,* 20 Fla. 815; *Kleis v. Niagara Fire Ins. Co.,* 117 Mich. 469, 76 N. W. 155; *John R. Davis Lumber Co. v. Scottish Union & Nat. Ins. Co.,* 94 Wis. 492, 69 N. W. 156; *Michigan Pipe Co. v. Michigan Fire Ins. Co.,* 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277."

Of course, one of the essential elements of any contract is a meeting of the minds between *parties.* The Civil Code of California expresses this as follows:

"1550. ESSENTIAL ELEMENTS OF CONTRACT. It is essential to the existence of a contract that there should be:

"1. Parties capable of contracting;

"2. Their consent;

"3. A lawful object; and,

"4. A sufficient cause or consideration."

Civil Code, Sec. 1550.

How, therefore, can it be said that appellant entered into a contract of insurance with the appellees when there is no showing whatsoever that the appellees were ever mentioned or even thought of at the time.

Plaintiff sues appellee, *Mercantile Insurance Company* for 5% of the loss and appellee, *The Reliance Insurance Company* for 7½% of the loss. There is no pretense that prior to the fire there was any such an agreement. In the *Ogle Lake Shingle Co.* case quoted, *supra,* the court, while speaking of segregation of property, had the following to say:

"The contract is lacking in another essential: There was no segregation or division of the risk insured against."

The claimed agreement is lacking in another vital essential and that is there was no pretense of specifying the period during which the insurance was to continue. Not only is the alleged conversation deficient in this respect, but appellee, in answer to a direct question as to whether or not anything was said about the date from which he was covered, said that no such statement was had, that Oelsner merely said, "You are covered." This, of course, is a vital element of the contract.

The Delivery by Defendants' Agent, Oelsner, to Plaintiff of the Two Policies in Question After the Fire Could Not Create a Contract of Insurance Retroactive to the Date of the Fire.

Again disregarding the clear import of all the facts that Oelsner's intent in delivering the policies to appellant over a month after the fire was not to effect or confirm contracts of insurance between appellant and appellees, but was for the purpose of aiding appellant in his negotiations with the *National Fire Insurance Company,* and again, for the purpose of this argument, taking this delivery as unqualified and accepting for the argument appellant's version, we have a situation where written contracts were presented after the subject of the contracts had been destroyed, and assuming, for the sake of argument, that the presentation of the contracts by Oelsner to appellant was an offer and that appellant accepted the offer, nevertheless, this did not constitute contracts of insurance relating back to the date of the fire.

This stems from the very essence of insurance. Insurance is not an agreement to pay a very small for a very greater sum, but, as defined by all of the books and embodied in our statutory law, is:

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability arising from a contingent or unknown event."
>
> *California Insurance Code,* Sec. 22.

The rule is well nigh universal that an insurance contract cannot be entered into insuring against a loss that has already occurred, and particularly against a loss of property that is no longer in existence.

The Supreme Court of California has directly passed upon this proposition, and in a case that has never been questioned or overruled.

In *Crawford v. Transatlantic Fire Insurance Co.,* 125 Cal. 609, 58 Pac. 177, the court, in discussing the effect of a policy delivered after a loss, says:

> "The main question for determination was whether all the acts of said agents, taken together, amounted to an execution of the policy, so that it became obligatory on the defendant. If the policy—as the evidence for plaintiffs tended to show—was the memorial of a contract which in its essentials had been agreed upon by parol before the fire, and which the parties intended should take effect according to its terms on the 2d of May at noon, then certainly the subsequent delivery was sufficient to make the defendant liable on the instrument; its liability thereon probably attached even without actual delivery to the insured or his agent. (*Lightbody v. North American Ins. Co.,* 23 Wend. 18; *Davenport v. Peoria Etc. Ins. Co.,* 17 Iowa 176; *Franklin Insurance Co. v. Colt,* 20 Wall. 560; *Yonge v. Equitable Etc. Soc.,* 30 Fed. Rep. 902.) If, however—as the evidence for defendant tended to show—there had been before the fire no agreement that defendant should insure the building and issue its policy accordingly, such an agreement as would have made Crawford liable for the premium, then it is equally plain that delivery of the policy after the building had been destroyed, to the knowledge of the parties, could not impart to the instrument any effect whatever. (Civ. Code, secs. 2527, 2528; *Clark v. Insurance Co.,* 89 Me. 26; *People v. Dimick,* 107 N. Y. 13.)"

Civil Code, Sections 2527, 2528, cited in the foregoing quotation, were carried into the Insurance Code by Section 22 of the Insurance Code, above quoted, and the citation of these sections illustrates the court's reasoning and the reasoning for the rule that insurance is not and cannot be against a known loss, but only against a contingent or unknown event.

As said in the case of *Continental Insurance Co. v. Stratton,* 215 S. W. 416 (Ky.):

> "A revival of the contract of insurance can be operative only from the instant that it took effect, and the policy became rejuvenated and alive. It could not relate back, because a contract of insurance can only look forward, and never retrospectively."

The case of *Crawford v. Transatlantic Fire Insurance Co.,* 125 Cal. 609, quoted above, is apparently the only case in California where the subject under discussion has been precisely raised, that is, where there was in direct issue the question of the effect of a delivery of a policy after the destruction of the property where there was in issue a controversy as to whether or not there had been a previous oral mutual meeting of the minds; but the question decided and the law laid down is almost universally followed.

The proposition that an insurance contract must act upon property *in esse* has been touched upon by other California cases and the general rule followed.

In *Royal Insurance Co. v. Smith,* 77 F. 2d 157 (9th Circuit), the court said:

> "* * * If insurance is written upon an object which has no existence, it is void, irrespective of the knowledge of the parties. *Union Ins. Co. v. Ameri-*

can Fire Ins. Co., 107 Cal. 327, 40 P. 431, 28 L. R. A. 692, 48 Am. St. Rep. 140; *Crawford v. Trans-Atlantic Fire Ins. Co.,* 125 Cal. 609, 58 P. 177. It would be a violation of the principles which have always governed placement of insurance, and a sound public policy, to permit recovery where there was no insurable interest, *Hessen v. Iowa Auto. Mutual Ins. Co.,* 195 Iowa 141, 190 N. W. 150, 30 A. L. R. 657, even if the parties had agreed thereto. If enforceable, such a policy would be a legal wager."

In *Union Insurance Co. v. American Fire Ins. Co.,* 107 Cal. 327, 40 Pac. 431, cited in the foregoing quotation, the court said:

> "3. If there are no circumstances indicating the intention of the parties, and no time is specified in the contract the risk will be deemed to have commenced at the date of the contract.
>
> "4. In the case last mentioned, if, before the contract of insurance is made, the property had ceased to exist, although unknown to the parties, the risk never attaches."

In other types of insurance cases, however, the California Supreme Court has followed the same rule. In the case of *Western Indemnity Co. v. Industrial Accident Com.,* 182 Cal. 709, 190 Pac. 27, a compensation insurance case, the Supreme Court of California has the following to say:

> "The general rule covering this question is thus stated in Cooley's Briefs on Insurance, volume 1, at page 354: 'It may * * * be regarded as elementary that an agent has no authority to insure goods

which he knows to have already been destroyed by fire.' And this rule finds support in the following cases: *Mead v. Phenix Ins. Co.,* 158 Mass. 124, (32 N. E. 945); *Clark v. Insurance Co. of North America,* 89 Me. 26, (35 L. R. A. 276, 35 Atl. 1008); *Stebbins v. Lancashire Ins. Co.,* 60 N. H. 65. And in *Waterloo Lumber Co. v. Des Moines Ins. Co.,* 158 Iowa 563, (51 L. R. A. (N. S.) 539, 138 N. W. 504), the court said: 'It has frequently been held that an agent has no authority to insure property already destroyed. * * * (See, also, *Bentley v. Columbia Ins. Co.,* 17 N. Y. 421; 28 Cent. Dig. 703; 11 Dec. Dig. (Ins.) 127.) The principle laid down in these authorities is equally applicable to compensation insurance.

"Whether or not the insurer, under all the circumstances, could have issued a policy which covered the loss—either total or partial—the authorities we have cited sustain the proposition that, unless there is a subsisting contract of insurance when the loss occurs, a general agent, in the absence of express authority, has no power to issue a policy. We think it has been made clear that in this case there was no contract in force at the time of the injury. One was written on the day following the loss, but was never 'issued' until it was delivered to Smith on October 9th. Before that time the date of the application had been changed from September 25th to October 3d and the policy from October 3d to September 25th.

"The following authorities are cited in the brief filed by the respondent commission in support of the proposition that a general agent has authority to issue a policy covering a known loss and binding on his principal: *New York Ins. Co. vs. Russell,* 77 Fed. 103, (23 C. C. A. 43); *Insurance Co. v. Colt,*

87 U. S. (20 Wall.) 560, 567, (22 L. Ed. 423); *Eames v. Home Ins. Co.,* 94 U. S. 621, (24 L. Ed. 298; see, also, Rose's U. S. Notes); *Schultz v. Phoenix Ins. Co.,* 77 Fed. 374, 392; *Kennebec v. Augusta Ins. Co.,* 6 Gray (Mass.) 204; *Warner v. Peoria Etc. Ins. Co.,* 14 Wis. 345; *Komula v. General Assur. Co.,* 165 Wis. 520, (162 N. W. 919). These authorities are distinguishable from the case here in that in each of them, *prior to the loss,* the insured had signified his acceptance of the terms offered by the insurance company and thus a contract of insurance had been concluded. No authority has been cited, and we are aware of none, holding that a general agent, unless specially authorized, may issue a policy for a known loss where the terms of the contract of insurance had not already been settled upon.

"(7) The general rule is that whenever the parties have entered into a contract before the loss occurs or the policy has been issued, unless the authority of the general agent is expressly delimited, the policy, when issued, by operation of law relates back to the application and is dated accordingly—the policy being thereafter merely evidence of the contract; but this general rule has no application where the parties were not under contract at the time of the injury, and the general agent is without special authority to issue a policy to cover the loss."

The reason for the rule announced in the above cited and quoted California cases is well stated in the case of *Alliance Ins. Co. v. Continental Gin Co.,* 285 S. W. 257 (Tex.). In that case the court said:

"(1) Property *in esse* (with exceptions immaterial here) is the basis of a contract of or for fire insurance. A substantial element is the chance of

loss. If either thing be absent (*i. e.* if there be no property originally or chance of loss be precluded by the certainty incident to pre-occurring fire), the insurance company is in the absurd position of freely offering to pay a large and certain sum (here $10,500) if the insured will pay to it the comparatively insignificant amount of the premium (here, $341.20). Stated another way: In consideration of present payment by one party of the rate named, the other party agrees to pay a larger sum if, and when, a contingency happens; if the contingency does not happen, the one loses the small sum; if it does happen, the other loses the large sum (reduced by the smaller one); and it is entirely nonpermissible to assume that the parties intended to make, or did make, a contract requiring payment of the larger sum if either, or both, of them knew that the contingency, nominally *in futuro,* had already occurred. When good faith of both parties is assumed and the property does not exist, there is a mutual mistake of fact as to the very subject-matter of the agreement; if the insurer acts in good faith, but the insured knows of the previous destruction, there is present avoiding fraud. Kline Bros. & Co. v. Royal Insurance Co. (C. C.) 192 F. 378, and authorities there cited; Norwich Union v. Dalton (Tex. Civ. App.) 175 S. W. 459. The business of fire insurance has acquired quasi public aspects. Rate regulation has proceeded to the point where improper payment of losses substantially affects the well-nigh common burden. And because of these things, it is our opinion that public policy would inhibit the making or enforcement of an insurance contract in relation to imaginary property, even where both parties so intend.

* * * * * * * *

"There was no contract of any kind, therefore, in existence as between the Alliance Insurance Company and the assureds at the time of the loss. Afterward there was no property about which an enforceable contract could be made. The fire terminated the offer to contract which was then, through Sellers as agent of that company, being tendered, because it cut off possibility of subject-matter for a contract."

In *City of New York Ins. Co. v. Jordan,* 284 Fed. 420, the court said:

"'An agent of an insurance company has no authority to insure property already destroyed; and a policy written and intended as a substitute for a subsisting policy in another company, but not delivered, and of which the assured has no knowledge until after the property is destroyed by fire, is not a valid contract of insurance.' Stebbins v. Insurance Co., 60 N. H. 65; Kerr v. Milwaukee Mechancis' Ins. Co., 117 Fed. 442, 54 C. C. A. 616."

In the case of *Clark v. Insurance Co. of North America,* (Me.) 35 Atl. 1008, the court said:

"There was no contract between this plaintiff and the defendant company at the time the loss occurred. There was a subsisting contract between the plaintiff and the Commercial Union. The unauthorized attempt on the part of the agent of the defendant company to make such a contract by entering in his 'daily report' the memorandum of such contract was not enough. The contract of insurance is to be tested by the principles applicable to the making of contracts in general. The terms of the contract must have been agreed upon. This necessarily implies the action of two minds, of two contracting parties. If it is incomplete in any material particular,

or the assent of either party is wanting, it is of no binding force.

"Thus, in the case of Insurance Co. v. Young, 23 Wall. 85, 107, the supreme court of the United States, in speaking of the contract of insurance where a question similar to the one under consideration arose, say: 'The company assented to the policy, but the applicant never did. The mutual assent, the meeting of the minds of both parties, is wanting. Without it there is none, and there can be none.' Insurance Co. v. Ewing, 92 U. S. 377, 381.

"In this case the action of the agent in the transaction relative to the attempted change of risk to the defendant company was entirely *ex parte*. If we assume that he was acting with authority from the company, it was then no more than a proposition which had not been made known to the plaintiff. To give it validity required his knowledge and his consent. At the time of the loss, knowledge had not been conveyed to him, and his acceptance had not been given. The rights and liabilities of the parties are to be determined by their legal status at the time of the loss. It is inconceivable that the defendant company can be held liable for indemnity against loss when no contract for indemnity existed at the time the loss occurred.

"And if the property had been burned before any contract was entered into with the defendant company, even if we assume such contract to have been afterwards made, that fact was known to the agent, and the defendant company would not be liable. The property must be in existence to render a contract of insurance valid. Stebbins v. Insurance Co., 60 N. H. 65; Mead v. Insurance Co., 158 Mass. 124, 126, 32 N. E. 945."

In many of the cases cited the question of the meeting of minds necessary to constitute a valid contract and the effect of delivery after the fire has risen in situations where an agent for insurance companies, at the request of one of the insurance companies, had attempted to cancel a subsisting policy and substitute for it a policy of another insurer, usually the defendant in the case cited. The *K. C. Working Chemical Co.* case, cited and quoted from *supra*, is typical. In these cases one of the elements involved and frequently discussed is the authority of the insurance agent to act as agent for the assured in cancelling one policy and substituting another. But not even that element is present in this case as it has been stipulated that Oelsner was acting as agent for the appellees and was not the agent for the appellant in any respect, and the record is clear that Oelsner did not and did not attempt to cancel or reduce, which would amount to a partial cancellation, the *National* policy before the fire or substitute or add the appellees' policies thereto. The record is clear that he procured the appellees' policies in contemplation of an eventual reduction in the *National* policy and to be used only if and when that reduction was made by proper communication and assent of the appellant and the securing of commitments from sufficient other insurers to round out the necessary amount of insurance, and that he took no steps, nor did the *National* take any steps by communication with the appellant to in any way disturb or interfere with the coverage afforded by the *National* policy, which was 100%.

As above stated, we have proceeded with this argument on the basis of the admitted facts only, and from those admitted facts there is no question but that there never was any meeting of the minds between appellant and

appellees for insurance in the appellee companies, in other words, there never was a meeting of the minds before the fire. There is entirely lacking that essential of a contract of insurance, to wit, parties capable of contracting, and an offer communicated and an acceptance communicated, before the fire.

> "1565. Essentials of Consent. The consent of the parties to a contract must be:
>
> 1. Free;
> 2. Mutual; and,
> 3. Communicated by each to the other."
>
> *Civil Code,* Sec. 1565.

Nor was there any offer after the fire to insure or to insure property already destroyed. When Oelsner delivered the policies to appellant over a month after the fire, he accompanied it with the documents attached to Oelsner's affidavit on file herewith consisting of the questions and answers, his letter to the *National Fire Insurance Company,* and the questions and answers given to the *National's* attorney. These communications make it clear that he was not proposing to appellant then an insurance contract for appellant's acceptance, but was explaining a past transaction and explicitly pointing out that there had been no disturbance of the *National* policy prior to the loss and that the purpose of procuring the appellees' policies was only part of his efforts to procure commitments from insurance companies to present to appellant if and when the *National* policy was cancelled

or reduced. And if the appellant would take this delivery of the policies and the documents as a proposal, he would, of course, be compelled to accept in the terms offered, to wit, that there had been no change prior to the fire.

Obviously, if Oelsner could, as is apparently contended by appellant, by his *ex parte* action without appellant's knowledge or consent, insure appellant by companies represented by him and commit the appellant to the payment of a premium, then certainly, by the same token, he could cancel appellant's existing insurance and leave him without protection. In this regard, a statement made by the Supreme Court of Washington in the case of *Tacoma Lumber & Shingle Co. v. Fireman's Fund Ins. Co.,* 151 Pac. 91, is pertinent:

> "* * * We cannot subscribe to the doctrine that a fire insurance agent is such an agent of the insured that notice to him of the cancellation of a policy by the insurer is notice to the insured, nor that an attempt to cancel a policy pursuant to such notice without compliance with the terms of the statute or the stipulations of the policy will work a cancellation. The protection of an insurance policy would be precarious indeed if such should be held to be the law. Neither reason nor authority will sustain such a contention. (Citing many cases.)
>
> "It is self-evident that, since the cancellation of the first policy was invalid, the risk of the second did not attach. Undoubtedly the insured may waive notice of cancellation, since such provision is for his benefit, and may acquiesce in the substitution of policies; but the mere receipt of a second policy after the fire cannot be such a waiver, since the rights of

the parties can only be determined as of the time of the fire."

See also:

Royal Exchange Assur. of London v. Luttrell, 63 P. 2d 1240 (Colo.).

We have not discussed the claim of appellant that he compromised with the *National Fire Insurance Company,* which we believe is contrary to the facts as disclosed by appellent's own witnesses, for the reason that we believe it wholly immaterial, but whether the *National* fulfilled their contract in exact accordance with its terms, as is our contention, or whether there was a compromise between the Plaintiff and the *National,* could not affect these Defendants. In the case of *McGill v. Commercial Union Assur. Co.,* 5 F. 2d 589, the court, speaking of a similar situation, said:

> "* * * Evidently neither waiver by the insured in favor of the Home Company nor even an express agreement between the agent and the insured for cancellation of the Home Company's policies and substitution of the Commercial Union policy after the fire could bind the latter company, because its policy was to be issued upon property in existence, and after the cancellation of the policies of the Home Company."

In concluding this phase of our brief, we would like to pose a question. At just what precise point of time did the contracts of insurance take effect? Clearly, they could not have taken effect before the fire as neither

appellant nor anyone acting for or in his behalf had any notice or knowledge of them or of any of the facts relating thereto until on or about the 17th of May, 1947, after the fire. [Stip. of Facts, paragraph XIV; Tr. Vol. 1, p. 25.] At what point did the appellant become bound to accept the contracts and pay a premium therefor? Clearly not before the fire because he knew nothing about them. Could appellant have refused to accept the contracts when, as appellant claims, they were tendered to him on May 17th, after the fire? He certainly could have as he knew nothing about them until that date.

> "The burden of proof is upon the party alleging its existence to show by satisfactory evidence *that the negotiations were concluded, and the contract in fact made by which the parties became mutually bound; an infallible test is to determine whether both parties are bound.*"
>
> *John R. Davis Lbr. Co. v. S. U. & N. Ins. Co.,* 69 N. W. 156 (Wis.).

In *Vance on Insurance,* page 213, section 70, the author states:

> "From the necessity of mutuality in all contracts it follows that the policy in the hands of the agent cannot be binding on the insurer unless it is also binding on the insured. If the insurer is liable in case of loss, the insured is liable to pay the stipulated premium. *Hence, when the insured has the privilege of rejecting the policy upon delivery,* he cannot hold the insurer liable until actual delivery and acceptance of the policy." (Citing cases).

Appellant's Contention That,

(A) There Was a Constructive Delivery Before the Fire,

(B) There Was Actual Delivery After the Fire and Acceptance by Appellant,

(C) There Was a Demand for Payment of Premium.

Taking up appellant's contentions in their order, we will first notice the claim that there was a constructive delivery of appellee's policies before the loss occurred.

Clearly, in view of the authorities heretofore cited to the effect that there was no contract before the loss (or after, either) and no meeting of the minds thereon, and since, as these cases show, the written policy is merely a memorial of the contract or meeting of the minds, there could be no delivery, constructive or otherwise, before the loss. As above demonstrated, it would make no difference whether there was a policy or not, or whether it was delivered before or after the loss, if there was a contract or meeting of the minds.

Appellant cites but one case to this effect (*Hill v. Industrial Accident Comm.,* 10 Cal. App. 2d 178), and we do not believe that he is very serious in his contention.

In the *Hill* case there was a contract, as shown by the statement of the facts on page 181 of 10 Cal. App. 2d. Mortensen was a collecting agent for the insurance company. Hill applied to him for a policy of employer's liability insurance. The soliciting agent forwarded the application to the insurance company in San Francisco and the policy was written and sent by mail to the agent in Bakersfield. The agent met the assured on the street

and told him the policy had been received and the assured told the agent to hold the policy for him in his office until he called for it, and the agent agreed. There was a complete contract long before the loss here.

Moreover, the quotation which appellant in his brief presents in support of his contention is not complete. In fact, the real rule is contained in the same paragraph from which appellant quotes and in the three sentences immediately preceding the portion which appellant quotes, the court says.

> "'A policy is constructively delivered when, by agreement of the parties at the time of execution, it is understood to be delivered, and under such circumstances that the insured is entitled to immediate delivery. Constructive delivery is a matter of intention. If it was intended that the policy should be in force before it actually reached the hands of the insured, it will be deemed constructively delivered."

The undisputed and stipulated facts in this case show that there was no intention to deliver these policies before the loss, or at all, until Oelsner had procured commitments for other insurance and the *National* policy had been reduced to 35% of $200,000.00 and the appellant had been notified and acquiesced therein.

Appellant's next contention is that delivery of the policy after the loss and acceptance thereof by the assured made the policy effective for all purposes.

He says that insurance issued without the knowledge of the insured may nevertheless be ratified and accepted by him when the same comes to his knowledge, even after the loss. This statement, of course, begs the question

and disregards the admitted facts that there was no insurance before the loss and therefore nothing to be ratified, and furthermore that there was no person acting for or in his behalf whose acts he could ratify. Oelsner was not his agent and did not purport to be.

In *Ellison v. The Jackson Water Company and Bayerque,* 12 Cal. 542, the court, at page 551, said:

> "It cannot in strictness be said that Bayerque 'adopted and ratified' the contract between the plaintiff and the company. These terms are properly applicable only to contracts made by a party acting or assuming to act for another. The latter may then adopt or ratify the act of the former, however unauthorized. To adoption and ratification there must be some relation, actual or assumed, of principal and agent. No such relation existed between the company and Bayerque; the contract between it and Ellison was not made in Bayerque's name, or for his benefit, or upon any authority from him."

In *Watkins v. Clemmer,* 129 Cal. App. 567 (19 P. 2d 303) the court said, at page 570:

> "A 'ratification can only be effectual between the parties, when the act is done by the agent *avowedly for or on account of the principal, and not when it is done for or on account* of the agent himself, or of *some third person.'* The quotation is from Story on Agency, seventh edition, section 251a, and the emphasis is ours. The learned author then makes the following comment: 'This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for

whom it purported to have been done and as his own act.' Mr. Mechem at section 347 of his work on Agency defines ratification as 'the subsequent adoption and affirmance by one person of an act which another, without authority, has previously assumed to do *for him while purporting to act as his agent*'."

In *Schweitzer v. Bank of America,* 42 Cal App. 2d 536 (109 P. 2d 441), the court, at page 542, said:

"* * * But a ratification can occur only by approving the act of the agent after the agent performs openly on behalf of his principal and not for himself. It is the subsequent adoption by one claiming benefits of an act which, without authority, another has voluntarily done while ostensibly acting as agent of him who affirms the act and who had the power to confer authority."

In our present case there was no agent acting for, or assuming to act for appellant, whose acts appellant could ratify, (b) nor was there anyone else acting for or in appellant's behalf whose acts he could ratify [Stip. par. XIV, Tr. Vol. 1, p. 25]. Oelsner was not his agent, as is stipulated, and no one else was appellant's agent. Whose acts could plaintiff adopt or ratify?

As we have seen from cases cited under the other section of this brief, there was no contract to ratify or adopt, as there was no meeting of the minds between anybody on a contract.

Again, if appellant could ratify, as he claims, the act of Oelsner, he must ratify it *en toto,* and Oelsner's act as testified to by Oelsner, who is the only one who could possibly know, was the procuring of the policies of appellees for the purpose of using them at some future

date if and when the *National* policy was reduced and Oelsner had procured additional insurance, and all these facts had been communicated to the appellant. It is fundamental that one cannot adopt the acts of another without adopting them *en toto.*

As said in the case of *Alliance Ins. Co. v. Continental Gin Co.,* 285 S. W. 257 (Tex.), quoted above to the other point in this brief, the court, now speaking of a claim of ratification of a contract that had not been in existence before the fire, said:

> "(2) A *fortiori,* ratification (rather, adoption) after destruction of the property of that which before the disaster was not a contract of or for insurance is an attempt to do by indirection that which cannot be directly done. The authorities (cases and text-books) cited, *contra,* may generally be distinguished and, thus, rendered inapplicable upon these grounds: (a) They had to do (or were predicated upon cases having to do) with marine insurance under the English law, contracts governed by principles different from those which apply to fire insurance, as pointed out in Norwich Union v. Dalton, *supra,* and in Kline Bros. & Co. v. Royal Insurance Co., *supra,* and as is disclosed, also, in the English case of Grover v. Matthews (1910), 2 K. B. 401, 79 Law J. K. B. (N. S.) 1025, 102 Law T. (N. S.) 650, 26 Times L. R. 411, 15 Com. Cas. 249. (b) Or they involved or referred to contracts of some kind, and at worst merely voidable, which had been so far consummated as to take effect prior to the loss by fire, *e. g.* Dalton v. Norwich Union, as considered and given disposition by the Commission of Appeals (213 S. W. 230). Except as thus distinguishable, and so far else as any of them may be relevant to the question now before us, we do not believe the cited precedents rest upon sound reasoning. We do

not have here a case which involves a contract that is merely voidable; but we do have one where there was a valid contract entered into before the fire (and without need of ratification as in Dalton v. Norwich Union last, *supra*) or where there was no contract at all prior to the loss in which situation attempted ratification was useless."

Appellant's Cases on This Point.

Appellant lays great stress on *Ferrar v. Western Assurance Co.,* 30 Cal App. 489 (159 Pac. 609), and quotes from that case, a short excerpt, which is obviously *dicta,* to the effect that a ratification may be made subsequent to a loss.

In that case there had been entered into previous to the loss a complete oral contract of insurance negotiated between one, Coleman, agent for the assured, and the manager of the defendant corporation. Coleman was the plaintiff assured's agent and acted for her and assumed to act for her and made the contract by written application and acceptance with Miller acting for and assuming to act for the insurance company. The court said that they had no doubt that the property was covered by a parol contract of insurance at the time of the fire, and further found that Coleman was the general agent of the assured plaintiff.

What was said regarding ratification was mere *dicta* and wholly unnecssary since the contract had been completed between competent parties before the fire. Even so, the *dicta* merely pronounces the settled rule of law. If Coleman were not the assured's general agent, but had limited authority and assumed greater authority and entered into a contract with the insurance company, she,

of course, could ratify his acts after the event. But, this statement in itself was not necessary for the decision and was *dicta,* as shown by the language of the Supreme Court in denying a petition to have the case heard in the Supreme Court, where the Supreme Court, on page 494 of 30 Cal. App., says:

> "The application for a hearing in this court after decision by the district court of appeal of the first appellate district is denied.
>
> "In denying the application we deem it proper to say that we do not express any view on the question of ratification discussed in the opinion. A decision on that question is not essential to a determination of the case, in view of what is correctly held in the opinion as to the status and authority of Coleman."

The case of *Hayward Lumber Etc. Co v. Lyders,* 139 Cal. App. 517 (34 P. 2d 805), cited by plaintiff, decides nothing. It is an isolated statement in the opinion of what the appellant therein contended and the court picks it up and drops it just as it is quoted in appellant's brief and no decision was based thereon, but the court in the final analysis did find against appellant.

In the case of *Kleiber Motor Truck Co. v. International Indemnity Co.,* 106 Cal. App. 709 (289 Pac. 865), the party who procured the insurance and whose acts were sought to be ratified by the plaintiff was required by contract to keep a truck insured for the benefit of plaintiff. The court said, on page 717 of 106 Cal. App., that he acted in part for himself and in part as an agent and representative of the plaintiff in procuring the insurance. In other words, he made a contract with the defendant insurance company, acting and assuming to act on behalf of the plaintiff, and the court held that,

whether or not the plaintiff had vested him with such authority prior to the loss, he could ratify his assumption to act for him after the loss, which is in line with all theories of ratification.

In both of the other cases cited, *Hooper v. Robinson* and *Phoenix Ins. Co. v. Hancock,* in the quotation in appellant's brief, the party assuming to act had entered into a valid contract of insurance with himself on one hand and the insurance company on the other, which contracts were for the benefit of third parties and were assumed to be for the benefit of third parties who could ratify the same, even after loss.

Finally, Appellant Claims That Appellees, by Demanding and Accepting the Premiums After Loss, Are Estopped to Deny That Their Policies Were Effective.

Aside from the fact that the statement in this premise is not true and that appellees never demanded or got a premium from appellant, and appellant's own affidavit shows that whatever charge was made against him by Oelsner has been wiped off by Oelsner crediting his account, the contention made by plaintiff on this point is wholly without merit.

It is fundamental that, while in proper circumstances estoppel may arise to prevent the forfeiture of a contract, estoppel alone can never create a contract or primary liability. Illustrative cases are:

> *Belt Auto Indemnity Assn. v. Ensley Transfer & Storage Co.,* 99 So. 787;
>
> *Nitche v. Security Benefit Assn.,* 255 Pac. 1052 (Mont.);

Macomber v. Mpls. Fire & Marine Ins. Co., 204 N. W. 331 (Wis.);

Standard Accident Insurance Co. v. Roberts, 132 F. 2d 794;

Ruddock v. Detroit Life Ins. Co., 177 N. W. 242, 248 (Mich.);

Peters v. Great American Ins. Co., 177 F. 2d 773.

The only case cited by appellant in support of this remarkable contention is *Hill v. Industrial Accident Comm.,* 10 Cal. App. 2d 178. As heretofore pointed out in discussing this case under another heading, in the *Hill* case there was a contract that had been completely executed by offer and acceptance and the language used by appellant in his brief is merely pointing toward the evidentiary effect of the billing for the premium.

The matter, as to whether or not collecting a premium after the loss will have any effect upon creating the contract, has been passed upon many times in California.

In *Strauss v. Dubuque Fire & Marine Ins. Co.,* 132 Cal. App. 283 (22 P. 2d 582), the court on page 294 said:

> "(7) The Plaintiffs call attention to the mailing of the check, its retention by the defendants, and the examination of the plaintiffs on the request of the defendants. Thereupon they assert that the defendants are estopped from making any defense. Regarding the examination of the plaintiffs under oath that subject is covered by the language of the policy, which distinctly provides that the procedure mentioned will not constitute a waiver. Regarding the transmission and retention of the check, it will be remembered that those incidents occurred after the

fire. They did not create a waiver nor an estoppel. (*McCormick v. Orient Ins. Co.,* 86 Cal. 260, 262 (24 Pac. 1003); *Goorberg v. Western Assur. Co.,* 150 Cal. 510, 518 (89 Pac. 130, 119 Am. St. Rep. 246, 11 Ann. Cas. 801, 10 L. R. A. (N. S.) 876).)"

In *Hargett v. Gulf Ins. Co.,* 12 Cal. App. 2d 449 (55 P. 2d 1258), the court at page 456 said:

"(6) The fact that the premium was paid to and accepted by the Monarch company within a few days after the fire and was not returned in whole or in part to plaintiff is not important and has no tendency to affect the rights of that company in the present litigation. The rights of the parties were fixed at the time of the loss. The insurance was not then in force but it had been in force before the chattel mortgage was given, and the company was entitled to the premium. (Civ. Code, secs. 2616 and 2618, then in force; *Gilmore v. Eureka Casualty Co.,* 123 Cal. App. 20 (10 Pac. 2d 810).)

"(7) Even though at the time the premium was paid to the Monarch company the company had actual knowledge of the existence of the chattel mortgage, which fact does not appear to have been established, the property had already been destroyed. Plaintiff must rely entirely upon the doctrine of estoppel to foreclose the defenses interposed by this company; obviously no estoppel could have arisen after the destruction of the property. An estoppel arises when the assured, because of some act or conduct of the insurer, has been dissuaded from obtaining other insurance upon the property and has proceeded to rely upon the validity of the policies he holds. Plaintiff was not, nor could he have been, prejudiced in any way by the acceptance and reten-

tion of the premium by the Monarch company after the destruction of the property. The evidence of plaintiff in the particulars we have pointed out falls far short of establishing an estoppel against any of the companies to rely upon the provisions of the policies, under which the property destroyed by the fire was not at the time covered by insurance."

See also:

Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130;

General Accident F. & L. Corp. v. Industrial Accident Comm., 196 Cal. 180, 237 Pac. 33.

Conclusion.

In conclusion appellees respectfully submit that there were no material disputed facts to warrant a judgment for appellant and that the undisputed facts entitled appellees to judgment in their favor as a matter of law, and the trial court's judgment should be affirmed.

Respectfully submitted,

Hindman & Davis,

By E. Eugene Davis,

Attorneys for Appellees.